



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KISUMU**

**CIVIL APPEAL NO. 56 OF 2014**

**BETWEEN**

**MASELUS ERIC ATIENO.....APPELLANT**

**AND**

**UNITEL SERVICES LIMITED.....RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon.S.O.Atonga,*

*SPM in the Chief Magistrates Court at Kisumu in*

*Civil Case No. 144 of 2013 dated 2<sup>nd</sup> May 2014)*

**JUDGMENT**

1. The appellant was injured on 12<sup>th</sup> November 2012 while riding aboard a motorbike. The respondent's driver carelessly drove motor vehicle registration number KBE 156 E causing it to collide with the motorbike at Kona Mbaya Junction at Kiboswa. The appellant filed suit seeking damages and after hearing the matter, the trial magistrate found the respondent 100% liable and awarded the appellant Kshs. 250,000/- as general damages.

2. The appeal is against the decision on quantum of damages only. In his memorandum of appeal dated 28<sup>th</sup> May 2014, the appellant challenged the judgment on the ground that the award of damages was inordinately low. Mr Okoth, counsel for the appellant contended that the trial magistrate failed to appreciate the degree, extent and long term effect of the injuries on the appellant. Counsel submitted that an award of Kshs. 800,000/- was appropriate in the circumstances. The respondent's advocates did not attend court despite being served with a hearing notice.

3. According to the plaint filed on behalf of the appellant, he sustained the following injuries;

- Fractures of the right leg tibia/fibula bones.
- Bruises on the right elbow joint.
- Tenderness and swelling on the right knee.
- Injury on the pelvic region.

- Injury on the right thigh.
- Injury on the right elbow joint.
- Pain on the abdomen.

4. The appellant testified that after the accident, he was treated at Jaramogi Odinga Oginga Hospital for the broken tibia/fibula bone which was cast in plaster of paris. Dr Okombo examined the appellant on 4<sup>th</sup> February 2013 and confirmed that he had sustained a right leg fracture and other injuries on the right elbow, abdomen, right knee and thigh and the pelvic region. The appellant complained of general pain at the time of examination. The doctor concluded that the appellant required further treatment in the form of physiotherapy and painkillers and that the fractured leg required further attention of an orthopaedic surgeon. He also opined that the scars required reconstructive surgery. He classified the injury as grievous harm.

5. Before the subordinate court, the appellant submitted that Kshs. 800,000/- as general damages was sufficient compensation. He called in aid the case of ***Kornelius Kweya Eichet v C & P Shoe Industries Ltd and Another NRB HCCC No. 1152 of 2002 [2008]eKLR*** where the plaintiff was awarded Kshs. 1,000,000/- in 2008 after sustaining blunt trauma on the forehead, a compound fracture of the left tibia and fibula bones which left him permanently disabled and requiring future medical attention. The respondent contended that the sum of Kshs. 160,000/- was adequate. It relied on ***Isaac Mwenda Micheni v Mutegei Murango NRB HCCC No. 335 of 2004 [2004]eKLR*** where plaintiff suffered a cut wound on the scalp, fracture of the tibia and fibula, cut on the right knee and bruised forearm and was awarded Kshs. 100,000/- in 2004.

6. As this an appeal on the issue of quantum, the general principle is that the assessment of damages is within the discretion of the trial court. The appellate court will only interfere where trial court either took into account an irrelevant factor or left out a relevant factor or that the award was too high or too low as to amount to an erroneous estimate or that the assessment is based on no evidence (see ***Kemfro Africa Ltd t/a Meru Express & Another v A. M. Lubia and Another [1982-88] 1 KAR 727***, ***Peter M. Kariuki v Attorney General CA Civil Appeal No. 79 of 2012 [2014]eKLR*** and ***Bashir Ahmed Butt v Uwais Ahmed Khan [1982-88] KAR 5***).

7. I would further add that in determining whether to interfere with the award, the court must bear in mind that damages are meant to compensate a party for the loss suffered but not to enrich a party, and as such, they should be commensurate to the injuries suffered. Where past decisions are taken into consideration, they should be taken as mere guides as each case depends on its own facts but an element of inflation should be factored in as well as the purchasing power of the Kenyan Shilling at the time of the judgment.

8. Having evaluated the injuries sustained by the appellant, I find that they comprise a simple fracture and multiple soft tissue injuries. Although Dr Okombo suggested that the appellant required further orthopaedic treatment, he did not state the nature of treatment that would be required. Further, it was not apparent that the appellant suffered any form of residual or long term disability. In my view, the case cited by the appellant was on the higher side given the nature of fracture that the claimant sustained and the resultant disability in that case. The case cited by the respondent was apposite but was too low given the effluxion of time. Having regard to the nature of the injuries I have outlined, the decisions cited and the element of inflation, I cannot say that the award of Kshs. 250,000/- was inordinately low to invite this court's interference.

9. The appeal is dismissed. Since the respondent did not attend court, there shall be no order as to costs.

**DATED and DELIVERED at KISUMU this 17<sup>th</sup> day of January 2017.**

**D.S. MAJANJA**

**JUDGE**

Mr Okoth instructed by Geoffrey O. Okoth and Company Advocates for the appellant.

L. G. Menezes and Company Advocates for the respondent.